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June 8, 2018

Mr. Jim Fogarty
Superintendent
Berean Academy
1169 North Colombo Ave.
Sierra Vista, AZ 85635

(Sent via email to jfogarty@berean-academy.com)

Re: Berean Academy Charter School
OCR Case Number: 08-18-1210

Dear Superintendent Fogarty:

On February 5, 2018, we received a complaint, which alleged that Berean Academy Charter School (School) discriminated on the basis of disability. Specifically, the complaint alleged that the School failed to implement the Student's Section 504 Plan during the 2017-2018 school year when it did not: provide noise cancelling headphones; allow her to leave the classroom when she felt overwhelmed; and allow her to use the restroom when she asked. The complaint further alleged that the School failed to timely evaluate the Student after she was allegedly suspended 7 times during the 2017-2018 school year for a total of 16 days. Finally, the complaint alleged that the School failed to appropriately respond to requests for an evaluation during the 2017-2018 school year.

We are responsible for enforcing Section 504 of the Rehabilitation Act of 1973 and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department; and Title II of the Americans with Disabilities Act of 1990 and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. As a recipient of Federal financial assistance from the Department and a public entity, the School is subject to these laws and their regulations.

During our investigation we conducted interviews with the Complainant and exchanged correspondence with the School's principal, who was the School's designated representative for the investigation. We also reviewed documents provided by the Complainant and the School. Prior to the completion of OCR's investigation, the School agreed to resolve the issues raised in this investigation pursuant to Section 302 of OCR's Case Processing Manual (CPM). Below is a discussion of our review of the complaint allegations, the relevant facts, the legal requirements, and our determinations.

Background

During the 2017-2018 school year the Student was enrolled in the XX grade at the School. In August of 2017 the School drafted a Section 504 Plan for the Student based on disability diagnoses of XXXX. We reviewed the Section 504 Plan and found that it provided for the following

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accommodations: noise-canceling headphones, to be provided by the School; a quiet place to go to when the Student is feeling overwhelmed; and allowing the Student to go to the bathroom when she asks. The Complainant alleges that the School did not fully implement the Section 504 Plan.

The Complainant alleged that the school did not have noise-canceling headphones and did not indicate that they would purchase headphones, so she purchased four pairs of noise-canceling headphones – a pair for each class – at a cost of \$XXX apiece. The Complainant reported that she first raised her concerns about her belief that the School was not implementing the Plan to the Student's homeroom teacher, who responded that it was the Student's responsibility to request her accommodations.

Throughout the 2017-2018 school year the Complainant and School were in frequent correspondence about the Student's behavior, as evidenced by emails provide by the School. The parties discussed changes in the Student's medication, which affected her behavior and attention in class, and ideas for positive behavioral intervention systems.

The School provided paperwork for two documented suspensions. On October 3, 2017 the Student was suspended for nine days for bringing a XXX to school. On December 6, 2017 she was suspended for one day for being disruptive in class. In reviewing the Student's attendance records we noted that the Student also had 16 early dismissals and 8 excused absences. The Complainant alleged that the School had punished the Student for behaviors related to her disability by sending the Student home early for her behaviors. According to the Complainant these were not documented as suspensions but as early dismissals.

Due to the Student's behavior at School and because the School would send the Student home early for those behaviors, the Complainant said she asked the School to conduct a Functional Behavioral Assessment (FBA). The Complainant alleged that the School failed to respond to her request, so she obtained an FBA¹. The FBA was initiated in November of 2017, completed in January of 2018, and results were shared with the School in January of 2018. Per the Complainant, the FBA made two main recommendations. The first was that the Student needed positive reinforcements at school. The second was for an Occupational Therapy evaluation to determine whether the Student needed a sensory diet. The Complainant reported that the School agreed to provide a system of positive reinforcements but alleged that the School never actually implemented such a system.

The School further agreed to conduct an OT evaluation and on January 9, 2018 it obtained the Complainant's consent for the evaluation. The OT evaluation was never completed because the Complainant pulled the Student out of the School on February 14, 2018. The Complainant explained that she pulled the Student out of the School because it did not implement a behavior system of positive reinforcement, did not implement the Student's Section 504 Plan, and continued to send the Student home early due to her behavior.

During an interview the Complainant mentioned that in January of 2018 she also asked the School to provide the Student with a 1:1 aide to help address her behavior. The School's response, per the Complainant, was that the School did not have the staff to provide a 1:1 aide. The Complainant then decided to hire a 1:1 aide. The Complainant reported that the School informed her that in order to have the aide provide services at the School, the aide would need a Level 1 Security Card. The

¹ The Complainant reported that the FBA was fully funded by her insurance.

Complainant paid \$70 for the aide to apply for the Card but the Student was pulled from the School before the Card was issued.

Alleged Failure to Implement the Student's Section 504 Plan

The Complainant alleged that the School failed to implement the Student's Section 504 Plan accommodations.

The Section 504 regulations at 34 C.F.R. § 104.33(b) states that the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities.

The Complainant alleged that the School did not have noise-canceling headphones and did not indicate that they would purchase them, so she purchased a pair for each class, 4 in total. The School asserted that it had 3-4 pairs of noise-canceling headphones per class for its students to use as needed. The School provided us a photo of one of the headphones as an example; they were over the ear headphones with red headphone cups. The School's position was that the Complainant preferred to provide her own headphones, which the School allowed. In its position statement the School further explained that noise-canceling headphones had been in the classroom since the previous school year because the Complainant had initiated their use in the spring of 2017. Additionally, the School wrote that the Student knew where to find the headphones, that she was not shy about asking for things she wanted, and it was the Student's responsibility to obtain her accommodations when needed. The School's position is that once the novelty of the headphones wore off, the Student rarely asked for them.

During a rebuttal interview the Complainant said that the School told her that it did not have noise-canceling headphones. The Complainant said she was told this during a meeting with the School that was also attended by the Student's private therapists. The Complainant suggested that OCR could interview the therapists in order to corroborate the Complainant's assertion.

We reviewed an email from August 7, 2017, prior to the creation of the Section 504 Plan, where the Complainant asked the School about noise-canceling headphones as a potential accommodation and whether she should bring them to school. The homeroom teacher responded that he had no problem with the use of headphones if used appropriately and responsibly. Neither he nor any of the six other School staff addressed in the email, including the Principal, indicated that the School already had 3-4 pairs of headphones in each class.

Without interviews of School staff and potentially other individuals that attended meetings where noise-canceling headphones were discussed, we do not have enough information to make a final determination about whether the School failed to provide noise-canceling headphones and once provided by the parent whether the School failed to implement their use. However, in an email where the Complainant raised noise-canceling headphones as an accommodation the School never mentioned that it already had headphones the Student could use. The School did acknowledge to the Complainant that the Student rarely used the headphones. Additionally, the School's position was that it was the Student's responsibility to obtain her accommodations.

The Complaint also alleged that the School did not allow the Student to leave the classroom when she felt overwhelmed or use the bathroom when needed, per her Section 504 Plan. The School's position is that the Student was allowed to leave the classroom when she felt overwhelmed or needed to go to the bathroom. The School reported that the Student usually left the classroom daily to use the bathroom.

The Complainant disputed the School's assertions. The Complainant contends that the Student was never allowed to go to a quiet room when she felt overwhelmed. She stated that the Student would sometimes ask to go out to the hallway for a cooling off period, but her teachers would respond that she had not earned that as a reward. The Complainant also stated that the School would not allow the Student to leave the classroom to go to the bathroom because they believed she was using it as an avoidance technique. The Complainant said that prior to the FBA assessment the Student was urinating her pants almost daily and the Complainant would have to pack extra clothes for the Student every day.

None of the documents we reviewed provided information that would allow us to make a definitive conclusion about whether these accommodations were provided. Without interviews of School staff, we do not have enough information to determine whether or not the School failed to implement the accommodations of allowing the Student to leave the classroom when she felt overwhelmed or use the bathroom when needed. Responsibility for implementing the Student's Section 504 Plan lies with the School and its staff.

Alleged Failure to Timely Evaluate the Student

The Complainant alleged that the School failed to timely evaluate the Student after she was suspended 7 times during the 2017-2018 school year for a total of 16 days.

The Section 504 regulation at 34 C.F.R. § 104.35(a) requires school districts to evaluate eligible students with disabilities prior to any significant change in placement.

The School documented two formal suspensions of the Student -- on October 3, 2017 for nine days for bringing a pocketknife to school, and on December 6, 2017 for one day because the Student was disruptive in class. The Complainant alleged that the Student was sent home early several other days due to her behavior. While those days were not documented as suspensions, the Complainant alleged that they effectively served as suspensions.

The Student's attendance records show that there were 16 days during the 2017-18 school year that were listed as early dismissals -- three in August, four in September, four in November, three in January, and two in February. Another eight days were listed as excused absences. Among these 24 days, the Complainant alleged were the times that the School sent the Student home early due to her behavior.

The School's position is that the Student only received two suspensions during the 2017-2018 school year, totaling 10 days. The School asserted that if the Student was sent home early on any other days these were not suspensions but rather considered akin to a student going home early because they were not feeling well.

Additional information is needed to determine whether any of the early dismissals and/or excused absences were in effect suspensions. If they were then the Student would have potentially experienced a significant change in placement and 34 C.F.R. § 104.35(a) would have required the School to evaluate the Student prior to such change. To make such a determination we would need to know who initiated the early dismissals and excused absences. If they were initiated by the School staff we would need to know for what reason. If any early dismissal or absence was initiated by School staff due to the Student's behavior then that early dismissal or absence should have been documented as a suspension and should have triggered a Manifestation Determination Review and potentially an evaluation of the Student.

Alleged Failure to Respond to a Request for an Evaluation

The Complainant alleged that the School failed to respond to requests for an evaluation during the 2017-2018 school year.

The regulations implementing Section 504 at 34 C.F.R. § 104.35(b) requires school districts to establish procedures for the evaluation and placement of students with disabilities who need or are believed to need special education and/or related services.

The Complainant alleged that she requested a FBA in November of 2017 but the School failed to respond to her request, which is why she obtained her own evaluation. The Complainant also alleged that she requested a 1:1 aide and the school denied her request without evaluating whether one was necessary. Instead the School said they could not provide an aide because they did not have sufficient staff.

The School's position is that it has no record of the Complainant ever requesting an evaluation. The School asserted that the Complainant obtained her own FBA because it was a part of the private therapy that the Student was undergoing outside of school. The School further asserted that when the Complainant requested an OT evaluation in January of 2018 – as recommended by the FBA – the School acted on the request by obtaining the Complainant's consent for an evaluation and an OT evaluation was underway when the Complainant withdrew the Student from the School.

We reviewed a consent form that indicates that the School did receive the Complainant's consent for an OT evaluation on January 9, 2018. We also reviewed an email from the occupational therapist where she indicates that she started to evaluate the Student but was unable to finish because the Student had been withdrawn from the School.

We asked the School for its Section 504 procedures and it provided a 117-page document entitled Guidelines for Educators and Administrators for Implementing Section 504 of the Rehabilitation Act of 1973 – Subpart D. The School pointed out that the document was not included in its handbook – therefore not available to students and parents -- but it was used by the School as a guideline. The School also provided the URL² to its handbook.

The handbook includes half a page that is titled "Berean Academy Child Find Procedures." The School identifies six steps to those procedures. In short, it states that the School will conduct a screening of all incoming students. The screening will include but not be limited to reviewing

² http://berean-academy.com/berean_academy/downloads/201708171225000002017-18_Scholars_Handbook.pdf

existing school records, a screening form filled out by the homeroom teacher, and consideration of academics, cognitive issues, vision, hearing, adaptive development, communication, emotional, and psychomotor skills. The procedures state that the screening process will be completed within 45 days of enrollment. The handbook does not include Child Find procedures as described by Section 504 or the Individuals with Disabilities Education Act (IDEA). The handbook does not lay out the procedures for how parents can obtain a Section 504 Plan or an Individualized Education Program (IEP). In fact, the handbook makes no mention of Section 504 Plans, IEPs, Section 504, or a Section 504 Compliance Officer.

We would need to conduct interviews with School staff to determine whether the Complainant in fact requested that the School conduct an FBA and consider providing a 1:1 aide and if so, whether the School failed to respond. Though it is clear that that the School's handbook does not provide notice to parents and students of their rights to obtain an evaluation and how they can obtain a Section 504 Plan and/or IEP.

Alleged Failure to Appropriately Respond to a Complaint

The Complainant alleged that the School failed to appropriately respond to a complaint that the Student's Section 504 Plan was not being implemented.

The regulation implementing Section 504 at 34 C.F.R. § 104.36 requires school districts to establish and implement a system of procedural safeguards that includes notice, an opportunity for the parents or guardian to examine relevant records, an impartial hearing with the opportunity for participation by parents or guardian and representation of counsel, and a review procedure.

The Complainant alleged that she first raised concerns about the Student's Section 504 Plan not being implemented to the homeroom teacher, at the beginning of the 2017-18 school year. Per the Complainant, his response was that it was the Student's responsibility to ask for her accommodations.

The School's position was that it did implement the Student's Section 504 Plan. The School asserted that the emails they provided indicate that the School and Complainant were in constant contact throughout the school year and there was never a time when the Complainant expressed a concern that the Section 504 Plan was not being implemented. The School did acknowledge that at one of the last meetings it had with the Complainant she raised a concern that the Plan was not being followed. The School said that it explained to the Complainant that the Student did not often ask for the headphones and often left the classroom, both to use the restroom and for a timeout. The School further explained that when the Student left the classroom for a timeout she would go to another classroom, a third grade classroom, the special education classroom, the Dean of Students' office, or the Principal's office.

None of the emails we reviewed contained an explicit statement from the Complainant where she stated that the School was not implementing the Plan. However, the emails do indicate that as the school year progressed, the Student's behavior and the side effects from medication meant to address the behavior were interfering with the Student's ability to access her education. The emails indicate that the Complainant sought to have a behavior intervention system put in place that focused on positive reinforcement. The emails also indicate that the Complainant did not believe that the School staff was committed to consistently implementing such a system. We found no evidence that the

School attempted to schedule a Section 504 Plan meeting to discuss the Complainant's desire to implement a behavior system or address the concerns both parties expressed about the Student's behavior. Interviews of School staff would be necessary to determine whether the Complainant raised complaints that the Student's Plan was not being followed, and how those complaints were addressed.

In reviewing the School's Handbook we found that it contained one paragraph on grievance procedures, which is titled Due Process Procedures. It states that the first step in any conflict is to meet with the student's mentor. Step two would be to include the Principal. If the conflict is still not resolved, step three is for the matter to be addressed in writing with a request for a due process hearing by the Cochise Community Development Corporation Board, for a final determination. The Cochise Community Development Corporation Board is the corporate entity that runs the School and is the holder of the state charter.³

The Handbook does not include procedures for how parents may request a Section 504 Plan meeting or IEP meeting to discuss concerns. The Handbook does not identify a Section 504 coordinator. Nor does it provide notice that parents may file complaints to the state board of education, request a due process hearing from the state board of education, or file a complaint with OCR.

Conclusion

Further interviews were needed in order to make final determinations regarding the above allegations. Further interviews were not conducted because during our investigation and before we had made final findings regarding these allegations, the School expressed a willingness to resolve the complaint. The School agreed to draft policies and procedures that address Section 504; grievance procedures regarding complaints of disability discrimination; and the discipline of students who are or may be eligible for special education and/or related services. The School also agreed to train its staff on these new policies and procedures and create and staff the position of Section 504 Coordinator. Finally, the School agreed to reimburse the Complainant the cost of the four noise-canceling headphones and the application for a Level I Security Card – which would have been used by the 1:1 aide obtained by the Complainant.

A copy of the signed Resolution Agreement is enclosed. When the Agreement is fully implemented, this allegation will be resolved consistent with the requirements of Section 504 of the Rehabilitation Act of 1973, Title II, and their implementing regulations. OCR will monitor implementation of this Agreement through periodic reports from the School about the status of the Agreement terms. We will provide the School written notice of any deficiencies regarding implementation of the terms of the Agreement and will require prompt actions to address such deficiencies. If the School fails to implement the Agreement, we will take appropriate action, as described in the Agreement. We will provide the Complainant with copies of our monitoring letters.

This concludes OCR's investigation of this complaint and should not be interpreted to address the School's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The case is now in the monitoring phase. The monitoring phase of this case will be completed when OCR determines that the School has fulfilled all terms of the Agreement.

³ <https://asbcs.az.gov/sites/default/files/Cochise%20Community%20Development%20Corporation%20-%20Charter%20mission%20and%20decrease%20instructional%20days.pdf>

When the monitoring phase of this case is complete, OCR will close this case and send a letter to the School, with a copy to the Complainant, stating that this case is closed.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, we may release this document, related records, and correspondence upon request. If OCR receives a request, we will protect personal information to the extent provided by law.

Individuals filing a complaint or participating in the investigation process are protected from retaliation by Federal law.

Thank you for your cooperation and attention to this matter. If you have any questions, please contact XX, at XX. I can be reached at (303) 844-6083.

Sincerely,

/s/

Angela Martinez-Gonzalez
Supervisory General Attorney

Enclosure – Copy of Resolution Agreement